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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92061031
Party	Defendant National Association of Realtors
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Date	12/10/2015
Attachments	Schermerhorn Cancellation Reply Brief.pdf(203542 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD**

<b>Jeffrey Schermerhorn,</b>  <b>Petitioner,</b>  <b>v.</b>  <b>National Association of Realtors<sup>®</sup>,</b>  <b>Respondent.</b>	<b>Cancellation No.: 92061031</b>  <b>Registration No.: 519,789</b>  <b>Mark: REALTOR</b>
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**REPLY BRIEF IN SUPPORT OF RESPONDENT’S  
MOTION FOR SUMMARY JUDGMENT**

**I. INTRODUCTION**

Respondent National Association of Realtors<sup>®</sup> (hereinafter “Respondent” or “NAR”) files this reply brief in support of its motion for summary judgment based on licensee estoppel. This brief responds to Petitioner Jeffrey Schermerhorn’s (hereinafter “Petitioner” or “Schermerhorn”) “Motion to Deny and Cancel the Respondent’s Motion for Summary Judgment with Supporting Documentation and Response to Motion.”<sup>1</sup> Schermerhorn has petitioned to cancel NAR’s Registration No. 519,789 covering the collective membership mark REALTOR<sup>®</sup> based on allegations of genericness. NAR has moved for summary judgment on the basis of licensee estoppel. NAR’s opening brief provided facts and supporting law to show that (1) Schermerhorn is a current member of NAR;<sup>2</sup> (2) pursuant to such membership, he a current licensee of the REALTOR<sup>®</sup> mark;<sup>3</sup> and therefore (3) Schermerhorn is estopped from challenging the

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<sup>1</sup> This reply is supported by the Supplemental Affidavit of Cliff Niersbach (“Supp. Niersbach Aff.”).

<sup>2</sup> See Respondent’s Motion for Summary Judgment and Supporting Memorandum of Law (“MSJ”) at 4, citing Niersbach Aff. ¶¶ 9-10, Ex. C. See also Petitioner’s Motion to Deny and Cancel the Respondent’s Motion for Summary Judgment with Supporting Documentation and Response to Motion (“Response”) at 3.

<sup>3</sup> See MSJ at 3, citing Niersbach Aff. ¶ 5, Exs. A and B.

registration at issue. Schermerhorn does not dispute those facts, nor does he dispute the applicable law. Accordingly, there is no genuine issue of material fact, and NAR is entitled to judgment as a matter of law.

Nevertheless, NAR submits this short reply to clarify the record and address certain unfounded assertions made by Schermerhorn.

## **II. ARGUMENT**

### **A. Relevant Legal Standard**

Summary judgment is an appropriate method of disposing of cases in which there is no genuine dispute with respect to any material fact, thus leaving the case to be resolved as a matter of law. *See* Fed. R. Civ. P. 56(a). The party seeking summary judgment bears the burden of establishing the lack of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). As the Board is aware, once a properly supported motion for summary judgment is filed, the adverse party cannot simply oppose the motion by asserting that a fact is disputed. Rather, Rule 56(c) requires that:

a party asserting that a fact... is genuinely disputed must support the assertion by (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

To defeat a properly supported motion for summary judgment, the non-moving “must present sufficient evidence to show an evidentiary conflict as to the material fact in dispute.” *Opryland USA Inc. v. The Great American Music Show, Inc.*, 970 F.2d 847, 850 (Fed. Cir. 1992). The party opposing summary judgment must do more than present “some” evidence on an issue that it asserts is disputed. *Avia Group Int’l, Inc. v. L.A. Gear California, Inc.*, 853 F.2d 1557,

1560 (Fed. Cir. 1988). Further, mere denials or conclusory statements are insufficient to avoid summary judgment. *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 836 (Fed. Cir. 1984). Even disputed material facts will not defeat summary judgment when, taking all factual inferences in favor of the nonmovant, the moving party is nonetheless entitled to judgment as a matter of law. *Young Dental Mfg. Co. v. Q3 Special Prods., Inc.*, 112 F.3d 1137, 1141 (Fed. Cir. 1997).

In the present case, NAR is entitled to summary judgment under the applicable legal standards. The MSJ establishes that Schermerhorn is a member of NAR and a licensee of the mark that he seeks to cancel. MSJ at 2-5. NAR supports its MSJ with an affidavit by Cliff Niersbach, Associate General Counsel of NAR, and exhibits including Schermerhorn's application to join NAR, confirmation that Schermerhorn has renewed his NAR membership, and the Bylaws and Constitution governing Schermerhorn membership, which demonstrates that Schermerhorn is a licensee of the REALTOR<sup>®</sup> mark. MSJ at 2-5; Niersbach Aff. Ex. A-C. Schermerhorn admits in his response that he is a member of NAR and a licensee. Response at 3 ("As I Jeffery Schermerhorn currently Licensed as indicated by NAR and a Member is as indicated"). Moreover, Schermerhorn does not contest any of the pertinent facts set forth in the MSJ or the Niersbach Affidavit. Schermerhorn has provided no evidence that creates an evidentiary conflict.<sup>4</sup> Therefore, the MSJ should be granted and judgment entered in Respondent's favor.

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<sup>4</sup> NAR notes that the evidence on which Schermerhorn relies should not be considered as it is not part of the record and not supported by an affidavit or declaration. *See* Fed. R. Civ. P. 56(c)(1)(A); TBMP § 528.05(a)(1).

## **B. Schermerhorn Admits He Is a Licensee**

There is no dispute that Schermerhorn is a licensee. Schermerhorn admits in his response that he is a member of NAR and a licensee. Response at 3 (“As I Jeffery Schermerhorn currently Licensed as indicated by NAR and a Member is as indicated”). Schermerhorn does not dispute that he receives all of the benefits as a member and licensee of NAR. Moreover, NAR submitted an affidavit by Mr. Cliff Niersbach, the Bylaws of the REALTOR® Association of Sarasota and Manatee, Inc., NAR’s 2015 Constitution and Bylaws, and Schermerhorn’s application for membership to NAR. MSJ, Niersbach Aff. at Exs. A-C. Mr. Niersbach has worked at NAR for approximately 40 years and is familiar with NAR’s overall business operations and benefits and services provided to its members. *See* Niersbach Aff. ¶ 1.

Schermerhorn’s arguments about Exhibits A and B to the Niersbach Affidavit are unfounded. Schermerhorn appears to contend that the 2015 versions of the Constitution and Bylaws are not applicable to him, because he joined NAR in 2013. However, when he became a member of NAR, Schermerhorn expressly agreed as follows:

I agree as a condition of membership to thoroughly familiarize myself with the Code of Ethics of the NATIONAL ASSOCIATION OF REALTORS® (NAR)... and the Constitution, Bylaws, and Rules and Regulations of SAR, the Florida Association of REALTORS® (FAR) and NAR. I further agree that my act of paying dues and fees shall evidence my initial and continuing commitment to abide by the Code of Ethics, Constitution, Bylaws, Rules and Regulations, and duty to arbitrate, *all as from time to time amended*.

Niersbach Aff., Exhibit C (emphasis added). The 2015 version of the Constitution and Bylaws attached to the Niersbach Affidavit as Exhibit A and B were the versions in effect and applicable to Schermerhorn’s membership at the time this Petition to Cancel was filed. Moreover,

Schermerhorn renewed his membership in 2015, after both of these documents came into effect, and prior to the filing of the cancellation petition. Niersbach Aff. ¶ 10.<sup>5</sup>

**C. Schermerhorn's Additional Contentions Are Without Merit**

Schermerhorn also contends that he was “forced” to join NAR and that “membership is required.” These assertions are unfounded and are actually undermined by Schermerhorn’s own submissions, which indicate that his employer provided him with options other than joining NAR.

To give some background, individual real estate professionals can become members of NAR. Supp. Niersbach Aff. at ¶ 2. Dues are assessed to the designated principal member of a firm based on the number of real estate licensees employed by or affiliated as independent contractors with the firm. Supp. Niersbach Aff. at ¶ 3. Credit is given for each real estate licensee who voluntarily joins a local REALTOR® association. *Id.* The fee assessed is thus based on the number of licensees associated with the relevant firm, including both licensees who have elected to become members as well as those licensees who are not members. *Id.* Neither NAR nor its local associations require non-principal real estate licensees affiliated with the firm to be members of the local association of the designated principal member. *Id.*

Schermerhorn’s submissions indicate that the firm with which he is associated, Capital Real Estate Enterprises Inc., provided Schermerhorn with options, including joining NAR or switching to the Florida Referral Group as a real estate agent. *See* Response Exhibits B and D. Schermerhorn opted to become a member of NAR, and renewed that membership as recently as January 2015. *See* MSJ, Niersbach Aff. at ¶¶ 9-10, Ex. C. Accordingly, there is no issue of genuine disputed fact that Schermerhorn is a member and licensee of the REALTOR® mark.

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<sup>5</sup> As a practical matter, Schermerhorn does not dispute that he was also a licensee under the 2013 version of the Constitution and Bylaws when they were in effect.

### **III. CONCLUSION**

For all of the foregoing reasons, NAR respectfully requests that the Board grant its motion for summary judgment and dismiss this cancellation petition with prejudice.

Respectfully submitted,

NATIONAL ASSOCIATION OF REALTORS®

Dated: December 10, 2015

By:           /Jeffery A. Handelman/            
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<b>Jeffrey Schermerhorn,</b>  <b>Petitioner,</b>  <b>v.</b>  <b>National Association of Realtors<sup>®</sup>,</b>  <b>Respondent.</b>	<b>Cancellation No.: 92061031</b>  <b>Registration No.: 519,789</b>  <b>Mark: REALTOR</b>
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**SUPPLEMENTAL AFFIDAVIT OF CLIFF NIERSBACH AND RELATED EXHIBITS**

State of Illinois            )  
                                      ) ss  
County of Cook            )

1. My name is Cliff Niersbach. I am Associate General Counsel of the National Association of Realtors<sup>®</sup> (hereinafter "NAR"), the respondent in the above-captioned proceedings. I submitted an affidavit in support of NAR's Motion for Summary Judgment in the above-caption proceeding and now submit this supplemental affidavit.

2. Individual real estate professionals can become members of NAR.

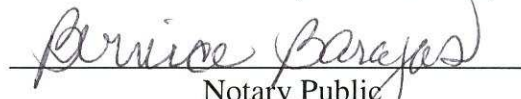
3. Dues are assessed to the designated principal member of a firm based on the number of real estate licensees employed by or affiliated as independent contractors with the firm. Credit is given for each real estate licensee who voluntarily joins a local REALTOR<sup>®</sup> association. The fee assessed is thus based on the number of licensees associated with the relevant firm, including both licensees who have elected to become members as well as those



licensees who are not members. Neither NAR nor its local associations require non-principal real estate licensees affiliated with the firm to be members of the local association of the designated principal member.

  
Cliff Niersbach

SUBSCRIBED AND SWORN to  
Before me this 10<sup>th</sup> day of December, 2015

  
Notary Public



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing REPLY TO PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT was served on Petitioner by first class mail on this 10<sup>th</sup> day of December, 2015 in an envelope addressed as follows:

Jeffrey Schermerhorn  
7070 Curtiss Avenue  
Sarasota, FL 34231

/Andrew J. Avsec /